United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7115

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-7115

FIREBIRD SOCIETY, ET AL

Plaintiffs - Appellees

V.

MEMBERS OF THE BOARD OF FIRE COMMISSIONERS, CITY OF NEW HAVEN, ET AL

Defendants - Appellees

B

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THE FIREFIGHTERS COMMITTEE TO PRESERVE CIVIL SERVICE, ET AL

Intervenors - Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF CONNECTICUT

PLAINTIFFS-APPELLEES BRIEF

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STATEMENT OF THE CASE

This is an appeal from the District Court's denial of an application to intervene in a Title VII employment discrimination action. The application was 11 1/2 months after the commencement of the action and 3 weeks after its termination in an order "acquiesced in" by all the parties. The would-be intervenors are 16 white members of the New Haven Department of Fire Services holding various ranks, and an organization they and others have formed for the purpose of intervening in this lawsuit (App. 142A). The firefighters' union has not asked to intervene.

The Parties

Plaintiffs are the Firebirds Society, an organization comprising all the black members of the New Haven Department of Fire Services (there are no hispanic members) and several black firefighters and would-be minority firefighters. Defendants are the City of New Haven, its Mayor, the Chief of the Department, and the Board of Fire Commissioners and Civil Service Commission and their members. Seventeen white Lieutenants scheduled for appointment to Captain timely requested and were granted permission to intervene. (App. 135A)

Plaintiffs' Lawsuit

Plaintiffs filed a complaint with the Equal Employment Opportunities Commission on May 15, 1973. (Br. App. 1B-5B)* On October 4, 1973 they received a "right to sue" letter from the Department of Justice (Br. App. 12B-13B) and this action was filed the next day. In their complaint plaintiffs alleged that the defendants had for many years discriminated intentionally and unintentionally against minorities in the Department, both in hiring and in promotions. The discrimination was allegedly achieved by using discriminatory entrance and promotional examinations; manipulating efficiency ratings; establishing the number of promotions made from an eligibility list after the list was compiled and without regard to the number of actual vacancies to be filled but instead in such a way that the cut-off point was just above the first black candidate; and actual alteration of test scores of certain favored (white) candidates. (App. 8A-28A , Br. App.1B-5B). Allegedly as the effect of this discrimination, the Department was three percent black in a city thirty percent black and only one of approximately one hundred officers was black.

The complaint requested racial quotas in both hiring and promotions as well as monetary relief and elimination of discriminatory hiring and promotional criteria. (App. 26A - 28A). It also requested immediate relief from the imminent promotion of 17 white Captains allegedly selected as a "stockpile" for future vacancies to prevent the lone black lieutenant from being

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*Certain documents in the record apparently omitted from the Joint Appendix are reproduced as an Appendix to this brief, to which the citation "Br. App." refers.

promoted, and from the imminent hiring of 18 recruits, of whom all but one were white. (App. 25A, 26A)

The Court Proceedings

The Court granted a temporary restraining order the day the complaint was filed, after hearing counsel for plaintiffs and defendants. The order, which was thereafter renewed periodically with the consent of all the parties, prohibited all hiring and promotion including that of the 18 recruits and 17 would-be captains.

At the hearing on the application for a T.R.O., the Court ordered notice of its order and the lawsuit disseminated to members of the Department in the following way: in each fire house was posted a copy of the T.R.O., a copy of plaintiffs' prayers for relief, including, of course, their prayers for promotional quotas (App. 27A), and a copy of a covering notice informing every firefighter that "Any members of the Department wishing to intervene in this lawsuit are entitled to intervene and should seek counsel immediately in order to be present at a pre-trial hearing in the District Court at 2:00 P.M., Monday, October 15, 1973." (App. 204A). By October 15th, every one of the 17 would-be captains had contacted W. Paul Flynn, counsel to the Firefighters Union, and Attorney Flynn appeared at the conference on their behalf and represented them continuously thereafter. They were formally granted intervening party status on December 5, 1973.

On December 5th, after much negotiation, the first of the orders to which the would-be intervenors now object was entered. (App. 29A-35A). It, like all orders in the case, was acquiesced in by all the parties. Among its provisions it established hiring quotas and a recruiting program and required the defendants to make "good faith efforts" to increase the number of minority lieutenants and captains. (App. 33A, 33B).

It provided that subsequent lieutenants' and captains' lists would be submitted to the Court for examination for a determination of "good faith" before promotions were made. This requirement was in addition to a requirement that future promotional examinations comply with Title VII (App. 33A). The Court explicitly retained continuing jurisdiction of the entire action, and plaintiffs agreed to waive their damage claim on October 1, 1975 if defendants complied with the order, including, of course, the efforts to increase minority representation in the ranks of Lieutenant and Captain.

In short, extensive supervision of promotions beyond the requirement of validated promotional examinations was established. In January, 1974 the December order was modified because, as the Court pointed out (App. 40A), the city was unable to produce a validated lieutenants' examination. Therefore, the defendants were required to compile and submit to the Court a proposed new lieutenants' list based on an exam which would not be validated, and this list would be examined by the Court. (App. 40A)

Despite the orders establishing a hiring quota and court examination of the results of a non-validated lieutenants' examination to determine the good faith of the defendants' efforts to create more black lieutenants, none of the would-be intervenors attempted to intervene at that time.

In May, the defendants produced their proposed lieutenants' list, which provided for the promotion of no blacks. The Court immediately ordered the list not to be disclosed, but still no one who took the test and might be on the list moved to intervene.

At the time the December, 1973 order was issued, an in camera agreement of the parties was filed under seal. (App. 36A, 37A). This agreement unilaterally bound plaintiffs to accept the promotion of seven blacks to lieutenant and one to captain as full compliance with the city's "good faith" obligations respecting promotions. If these promotions were not made, plaintiffs retained the option to go to trial. The defendants promised nothing. At the defendants' request, the agreement was filed with the Court but was sealed lest it be misconstrued as a promise by the city (as the would-be intervenors indeed now ask this Court to misconstrue it. Brief of Appellants at p3).

When the requisite number of blacks were not on the proposed lieutenants list, plaintiffs exercised their option to continue the lawsuit, and the docket sheet shows the beginning of discovery proceedings and placement of the case on the trial list. (App. 6A).

Nevertheless, negotiations continued. Plaintiffs' proof of discrimination in promotions was much strengthened by the clear showing of discriminatory impact in the lieutenants' examination: for the first time a substantial number of blacks - ten - took a promotional examination and the discrepancies in performance by race were highly significant. Plaintiffs were therefore able to win what they had not been able to before: the defendants agreed to the promotion of 7 blacks to the rank of lieutenant.

The Court thereupon issued its order of August 30, 1974. This is the order the would-be intervenors now wish to set aside. The order was entered with the acquiescence of all the parties. It reiterated the terms of the December order with respect to recruitment. It provided for "slotting in" the names of 7 blacks on the list of those to be promoted, with promotions otherwise going in the order of the defendants' proposed eligibility list. (App. 38A, 45A)

In this order, as in the entire lawsuit, extreme care was taken not to displace any whites from jobs in which they had an arguable interest. The court's injunction against hiring and promotions had been relaxed earlier to permit all the 18 enjoined recruits to go to work and the assignment of 7 captains and 2 lieutenants to vacancies. Now the balance of the captains whose assignment had been enjoined were permitted to take their assignments. Most significantly, the Court had determined that

no more than 21 lieutenants could reasonably be expected to be appointed during the two year life of the eligibility list. It therefore directed the appointment of at least 28 men from that list in order to insure that every white who would have been promoted had the list been allowed to stand would still be promoted.

Plaintiffs dropped their demand that defendants be placed under any court orders with respect to future captains' examinations beyond the requirement of compliance with Title VII, and a provision of the order provided that the order would not bind any of the parties (or anyone else) with respect to future captains' examinations. (App. 41A).

Publicity Surrounding the Case

From its inception the case attracted wide attention in the local press. (App. 211A - 222A). Each negotiation session was reported, and the December 5 order received television and radio as well as newspaper coverage.

Intensive reporting continued while the proposed lieutenants' list was restrained by the court order. White firefighters who hoped to be on the list could have read, and do not deny having read, on May 21, under a four-column headline, a local newspaper story indicating that the results of the lieutenants' examination were to be the subject of a court order in this lawsuit. On July 8 on page one of the Journal-Courier, New Haven's only morning paper, they could have

read that:

> One source reported that no minority firemen scored in the top 10 of those taking the test. Since on promotional examinations the department fills vacancies according to test rank, no minority firemen could be promoted at this time.
>
> Civil Service Commission Attorney Frank M. Grazioso and Corporation Counsel Thomas F. Keyes, Jr., have reportedly been trying to come up with a plan that would allow appointment of one or two minority firemen even though they would not normally qualify. Some firemen in line for promotion say they have already retained attorneys for a court fight should they be passed over.

(App. 215A).

The Motion to Intervene

No white firefighters moved to intervene while this case was pending after the Court's December order but, as advertised, intervention was sought after the case was over. The Motion to Intervene and supporting documents were filed September 20, 1974. The Motion indicates that the sole purpose of intervention would be to attempt to set aside the order, rather than to participate in its implementation or any other phases of the case. (App. 46A, 50A)

The bases for intervention set forth in the Motion appear to be:

1. The applicants for intervention should have been formally advised of the suit.

2. "At significant times during the litigation . . . the proceedings were held in closed session and subject to orders sealing the reward (sic) of the proceeding."

3. The intervenors "are directly affected by the order."

4. The order violated intervenors' constitutional rights and rights accorded them by city charter and their collective bargaining agreement.

5. The intervenors meet the requirements of Rule 24(a).

6. The intervenors did not know until "recently" that the defendants were willing to make the concessions they made; that, (as the motion claims) the parties agreed December 5, 1973 to the result announced August 30, 1974; or that the intervenors were not adequately represented by any of the existing parties.

The Court held a hearing on the Motion to Intervene. At the hearing, counsel for the applicants for intervention received one week to file an offer of proof in support of the various motions, which the Court said would be "accepted . . . as true, except with respect to the conclusory statements." (App. 199A)

The offer of proof actually filed is a jumble of facts and conclusions which essentially reiterates and elaborates on the assertions made in the Motion to Intervene. It also claims the lieutenants' examination which generated the list underlying the August 30 order was "job related and one doing better on the exam could reasonably be expected to perform better on the job" (App. 87A) but offers no facts to support this conclusion, and asserts that the Court's order will harm the morale and efficiency of the fire

department. Additionally, although listing four different ways the documents posted in all the firehouses might have eluded the notice of a firefighter, the offer does not allege that any would-be intervenor did not see the documents. In fact, the senior ranking intervenor, Albert Serletti, the co-chairman of the intervening organization, is reported by his lawyer to have "attempted to gain access to one of the chamber conferences but was denied access. He was told by person believed to be the trial court's secretary that he could not come in because he did not have an attorney." (App. 85A)

A supplemental offer of proof was filed, beyond the time permitted by the Court, setting forth civil service rules and contract provisions allegedly violated by the court's order and asserting that the in camera agreement was an agreement among all the parties to promote 7 blacks rather than what it purports to be: a unilateral agreement by plaintiffs. No factual support for this allegation is provided. (App. 36A, 37A)

The Court denied the Motion to Intervene in a comprehensive opinion setting forth in detail the nature of the negotiations and the reasons for the settlement. The Motion to Intervene was denied on the grounds that the would-be intervenors did not have a sufficient interest in overturning the Court's order to be permitted to intervene; that the intervention was untimely; that reopening the judgment would be unfair to plaintiffs, the

white intervenors, and the City's interest in having a fully-staffed fire department; and that in the circumstances of this case, the named defendants and the white would-be captains in fact adequately represented the interests of the would-be intervenors. (App. 129A, 148A)

This appeal followed.

ARGUMENT

I. THE COURT ACTED WELL WITHIN ITS DISCRETION IN REFUSING TO PERMIT INTERVENTION AFTER JUDGMENT.

A. The Standard of Review

The District Court found the application to intervene untimely. (App. 145A - 148A) Timeliness is a prerequisite to intervention under Rule 24, Federal Rules of Civil Procedure, even if intervention is claimed to be as of right. And it is now well established that timeliness

> is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

NAACP v. New York, 413 U.S. 345, 366 (1973). See also Hoots v. Commonwealth of Pennsylvania, 495 F.2d 1095, 1097 (3d Cir. 1974); Search Foundation, Inc. v. Honeywell, Inc., 459 F.2d 447,449 (8th Cir. 1972); Alleghany Corporation v. Kirby, 344 F.2d 571, 574 (2d Cir. 1965), cert dismissed as improvidently granted, 384 U.S. 28 rehearing denied, 384 U.S. 967 (1966).

The determination of timeliness under Rule 24 must

be made on the basis of "all the circumstances," NAACP v. New York, supra, 413 U.S. at 366, and as a general matter intervention after judgment should be denied as untimely. Alleghany Corp. v. Kirby, supra, 344 F2d 571, 574, United States v. Blue Chip Stamp Company, 272 F. Supp. 432, 435-441 (C.D.Cal. 1967), aff'd sub nom, Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968); Slusarski v. United States Lines Co., 28 F.R.D. 388, 390 (E.D.Pa. 1961). The Motion to Intervene here was filed three weeks after judgment, eight and one-half months after entry of the hiring order now complained of, eleven and one-half months after commencement of the action, and thirteen months after plaintiffs filed their complaint with the E.E.O.C. Review of the circumstances in this case demonstrates no reason for the Court below to have permitted intervention and, in fact, illustrates the importance of denying intervention to protect the interests of plaintiffs, the City, the public, and many white firefighters.

B. Notice was Ample to Require Earlier Intervention

The would-be intervenors do not deny that they knew this lawsuit was filed and that they followed its progress, nor could they. Comprehensive notice was posted in all the firehouses, and no would-be intervenor denies seeing that notice. Interim orders were issued by the Court which affected the Department. The case was thoroughly publicized in the press. The co-chairman of the white firefighters' organization attended a chambers

conference and was told his lawyer could attend if he procured one. (App. 85A). There are only 500 men in the entire New Haven Department of Fire Services, and it is inconceivable that any of them managed to remain ignorant of this major event in the Department. Firemen after all are not lighthouse keepers; they wait in their firehouses for the alarm to ring and have endless opportunities to discuss department business with their fellows.

The Supreme Court held in NAACP V. NEW YORK, supra that a basis for denying intervention would be that a District Court "could reasonably have concluded that appellants knew or should have known of the pendency of the . . . action because of an informative . . . article in The New York Times." 413 U.S. at 366. Here by contrast it is plain the would-be intervenors knew of the existence of the action from its inception. They do not deny, moreover, knowing of their opportunity to intervene, which was communicated to all firefighters by the posted notice. Within ten days of the Court's order of October 5, 1973, every one of the seventeen men on the Captain's list had secured counsel. The would-be intervenors obviously failed to do so out of choice, and they ask this Court to relieve them of the consequences of their choice.

They claim ignorance not of the lawsuit but of the result. This claim is wholly without substance; there was ample warning under the test set forth in NAACP V. NEW YORK, supra, that the relief to which the unsuccessful intervenors object might be forthcoming. First, they knew plaintiffs asked for such relief from the notices in the firehouses. Second, they knew at least as early as December 5, 1973, nine and one-half months before they moved to intervene, that the City and the intervening would-be Captains were willing to acquiesce in quota relief. It is

therefore odd to hear that they "are shocked that the parties to this suit consented to such a procedure [which] amounts to nothing more than reverse discrimination . . . based, not on merit, but on factors of race and ethnic origin." (App. 65A.)

Third, the December 5, 1973 order refers to "good faith efforts to increase minority representation" in the ranks of Captain and Lieutenant. Since the would-be intervenors objected to methods of increasing representation, including the one adopted for recruiting privates, they should have intervened in December 1973 to have a voice in the method of increasing minority officers. They knew that quota relief had been ordered on the recruiting level without a judicial finding after trial that there had been discrimination in recruitment; they should have known that no trial would necessarily be required before according a preference in promotions. *

Fourth, the court permitted administration of an unvalidated lieutenants' examination and then did not release the results of that examination. Since the examination was not required to be validated, but the City was required to make efforts to increase minority representation in the rank of lieutenant, a color preference was unavoidable -- especially when only ten of the one hundred fifty people taking the examination were Black.

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* BRIDGEPORT GUARDIANS V. CIVIL SERVICE COMMISSION, 482 F 2d 133 (2 Cir. 1973) does not suggest the contrary. In that case a quota remedy was approved for hiring but not for promotions because there was a showing of discrimination for hiring but not promotions. It established no rule that quota promotional relief is unlawful. If hiring quotas were deemed appropriate in this case without trial in light of what the parties knew of the history of the Department, so might promotional preference.

The circumstance of holding up examination results alone was sufficient to alert anyone who wanted to intervene before judgment.

Fifth, the front page of the New Haven Journal Courier carried the news that promotional preference was being considered two months before the Motion to Intervene and, most important, well before entry of judgment. See NAACP V. NEW YORK, supra, 413 U.S. at 366. (App. 215A).

The would-be intervenors complain that the President of the Firebirds told them that plaintiffs were only interested in validated promotional examinations. (App. 86A). Why then did plaintiffs request promotional quotas in their complaint? This claim is at best a misinterpretation of what was said, inasmuch as the President of the Firebirds did not take such a position, nor did any other plaintiff. In any event, if the NAACP was not permitted to rely on what it alleged were representations from three separate attorneys for the United States about the course they would follow in litigation, these would-be intervenors surely cannot rely on their allegation, unsupported by any reference to time or place, of what one plaintiff said on one occasion, where there was so much evidence to the contrary.

There is much talk in the moving papers andin Appellants' Brief of concealment and trickery in the settlement negotiations. On the contrary, there must be few cases in which settlement

negotiations were better publicized. The time of each negotiation session, if not its content, was fully reported in the press. The December 5, 1973 order gave ample notice, if any more was needed, that important adjudications of rights and interests were being made at the negotiating sessions. The notice in the firehouses specificially informed all members of the Department of their right ot participate in the litigation and the method of participating in conferences: namely by getting a lawyer. Co-chairman Serletti himself was told to get a lawyer if he wanted a voice in the negotiating sessions.*

The in camera agreement of December 5, 1973 does not have the sinister properties ascribed to it by the would-be intervenors. It is not an order that seven Blacks be promoted or an agreement that seven Blacks will be promoted. Examination of the order discloses that it is merely plaintiffs' agreement to accept a certain result as satisfactory. The form of the agreement makes sense since the City wanted from the plaintiffs formality of a commitment that a court order represented without but did not want the public to believe it was committed to promoting seven Blacks when it was not. (Appellants' misinterpretation of the document shows that the City's fears had substance.) In any

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*Appellants in their Brief suggest that an "opening hearing" would be fairer than closed negotiating sessions. If the argument is that special notice should have been given before entry of judgment based on a negotiated settlement, that argument is dealt with on pages 24 and 25, infra. If the argument is that trials are fairer than negotiated settlements, the argument is plainly false. The decision-making process in a trial is more secret than in a negotiation; it takes place within the mind of a judge. It is hard to imagine how the would-be intervenors would have been better served by watching a trial from the sidelines than by watching a negotiating process from the sidelines.

event, the in camera agreement was rendered obsolete by the examination results in May, 1974. The agreement simply was not part of the court's order of August 30, 1974 except insofar as plaintiffs remained true to their commitment not to press for relief beyond promoting of seven blacks to lieutenant.

Fundamentally, would-be intervenors are non-parties who are complaining because they are dissatisfied with the way the parties have acted. It is not surprising that parties to a lawsuit have more control over its outcome than non-parties, nor is it improper. The solution for a non-party is timely to seek party status rather than to express dismay at the conduct of a party. This the would-be intervenors failed to do.

Instead, on the issue of notice, the final claim of the unsuccessful intervenors is that even though they had actual notice of the pendency of the lawsuit they were nevertheless irremediably prejudiced by not receiving better constructive notice. They insist on the notice prescribed by Rule 23 (C). They want letters rather than a notice they do not deny seeing. But this is not a defendants' class action. It is not governed by Rule 23. Rule 23 does not require that any action be a class action. Therefore, it does not require that this action be one. If this action were a defendants' class action, and if the would-be intervenors were members of the designated class, then they would be bound (under any judgment) by rules of res judicata and the strict requirements of Rule 23 would be mandatory. Such is not the case here.

C. The Would-Be Intervenors Were Adequately Represented By the Existing Parties, And In Any Event Had Ample Notice Of The Claimed Inadequacy Of Representation

The timeliness required for intervention as of right has been tied to Rule 24 (a)'s requirement regarding adequacy of representation by existing parties. ALLEGHANY V. KIRBY, supra, see id at 575 (dissenting opinion of Judge Hays); NAACP V. NEW YORK, supra, 413 U.S. at 368; see also id at 374 (dissenting opinion of Mr. Justice Brennan).

The evidence here is that the existing parties adequately represented the interests asserted by the applicants for intervention and that the alleged inadequacies asserted by the applicants were apparent at least as early as December 5, 1975.

The City, its Fire Chief, the Board of Fire Commissioners and the Civil Service Commission can adquately represent and have adquately represented the interests asserted in job safety and a high quality fire department. Nothing in the court's order jeopardizes any of these goals. Likewise the seventeen intervening would-be captains and the plaintiffs, themselves, have as lively an interest in job safety and morale as the would-be intervenors. The economic interest of all white firefighters in Lieutenancies was as a matter of fact, adequately represented by the parties. The parties provided for seven additional promotions from the lieutenants' list so

that no white firefighter would suffer as a result of the order. (App. 142A).

If there was any inadequacy of representation, the "problem" was apparent from the start. The inadequacy claimed is first the City's interest in avoiding a damage claim. This interest was clear when the plaintiffs' prayers for relief were posted in the firehouses. It was crystal clear when the December 5, 1973 order specifically committed plaintiffs to withdrawing all their damage claims if the defendants hired and promoted adequate numbers of minority firefighters. Likewise the conflict claimed between the interest of the applicants and the interest of the white lieutenants on the captain's list was clear from the start and crystal clear when seven of those lieutenants were promoted as part of the order of December 5, 1973 and the promotion of the rest was made contingent upon satisfactory efforts by the defendants to promote Blacks to the rank of lieutenant.

D. The Would-Be Intervenors Have Not Demonstrated A Substantial Enough Interest To Justify Late Intervention

The court below found that the would-be intervenors were not necessary parties to this litigation because they did not have a sufficiently substantial interest in its outcome. The interest of a party requesting intervention is relevant to the timeliness of the request as well as to the determination that a would-be intervenor may intervene as of right; so both points will be discussed here together.

The abstract interest of white firefighters in not being denied promotions because of their race is substantial enough. BRIDGEPORT GUARDIANS V. CIVIL SERVICE COMMISSION, supra, 482 F 2d at 1341. But the interests at stake here are not abstract ones to be measured at the beginning of a lawsuit. The point of these proceedings is to undo the court's order of August 30, 1974, and the interest of the would-be intervenors in doing that is negligble, as the analysis of the District Court demonstrates.

Plaintiffs have just a few words to add to the District Court's analysis. There are additional reasons white firefighters on the lieutenants list do not have a protectible interest in their positions on the list. First, New Haven Civil Service rules permit promotion of anyone of the top three persons on a promotional list at any one time. This means that two people on any list may be passed over without any specification of reasons. (App. 95A, 103A). Second, a list may be terminated at any time between one and two years, at the discretion of the Board of Fire Commissioners. Promtoions can be and have been made in the Department without regard to the number of vacancies which the promotions are to fill. (Many promotions can be made and the extra men are simply "assigned" to vacancies as they arise.) Thus afirefighter's opportunity for promotion depends as much upon the arbitrary determination of the Board of Fire Commissioners as his standing on an eligibility list.

The firefighters who claim delay of their promotions because of the slotting in of blacks will be promoted much sooner if they lose than if they win. If intervention is permitted now, the case would be remanded for discovery, trial and another appeal, all of which would take years.

The "loss" to white firefighters from the slotting in procedure is the filling of 7 officers' positions by persons other than themselves, thereby reducing for a time the number of such positions available to whites from about one hundred to about ninety-three. This is a slim interest indeed for any one of the four hundred privates in the Fire Department to assert. It is far more plausible that the real "interest" asserted by the would-be intervenors is that attributed to one of their leaders, who said "the committee was formed to 'prevent people from being promoted who should not be promoted.'" (App. 219A) This "interest" in thwarting the ambitions and prospects of others is insufficient to justify intervention after judgment.

E. The Existing Parties Would Be Severely Prejudiced By Reopening The Judgment

This Circuit has stressed the principle that intervention should be permitted only to the extent that it will not harm the interests of existing parties. ALLEGHANY V. KIRBY, supra see especially id at 575 (dissenting opinion); see also NAACP V. NEW YORK, supra, 413 U.S. at 369, HARPER V. KLOSTER, 486 F. 2d 1134, 1137 (4th Cir. 1973).

If intervention were permitted here plaintiffs' promotions and the judgment they have won would be lost; they would have to wait years for relief the City agrees is due them immediately. The captains and recruits assigned by virtue of the settlement negotiations would probably find themselves out of jobs pending the outcome of the lawsuit. (App 147 A).

Intervention is sought for the sole purpose of setting aside the judgment below and reopening the lawsuit. The harm which would be done by permitting intervention necessarily includes the damage which would result from reopening the whole question of remedies. If the remedies are reopened, plaintiffs would lose the benefit of their judgment. The white captains and recruits would probably lose their jobs, inasmuch as the jobs were awarded them only in reliance on the settlement negotiations. (App. 147 A). Perhaps most devastating, the City of New Haven and its fire department would be without its full complement of officers and privates, and it would suffer the disruption caused by litigation for a long time to come. HARPER V. KLOSTER, supra. Such a result would be unjust to the parties and endangerthe people of New Haven.

F. The Would-Be Intervenors Have No Special Rights To Intervene As Allegedly Necessary or Indispensable Parties

The argument is made that the would-be intervenors are necessary or indispensable parties under Rule 19, Federal Rules of Civil Procedure. The claim was not made below in either the Motion to Intervene or the accompanying

Motion to Reopen Judgment (App. 46A-50A, 58A-61A). It is ill-founded here.

Title VII contains no requirement that the alleged beneficiaries of discrimination be parties to litigation. It specifies in detail who may and must be parties without requiring the novel requirement suggested by would-be intervenors.

Case law establishes the same proposition. See LEBEAU V. LIBBY-OWENS-FORD, 484 F. 2d 798 (7th Cir. 1973) NORMAN V. MISSOURI PAC. R.R., 414 F. 2d 73 (8th Cir. 1969); UNITED STATES V. ST. LOUIS-SAN FRANCISCO RAILWAY CO., 52 F.R.D. 276 (E.D. Mo. 1971) TODD V. JOINT APPRENTICESHIP COMMITTEE, 223 F. Supp. 12 (N.D. Ill. 1963). And the argument in support of the appellants' proposition makes no sense at all. It is urged that the test for compulsory joinder under Rule 19 should be the same as that for intervention as of right under Rule 24, but if the test is the same Rule 24 (a) is entirely superfluous - an unlikely result.

II. THE SETTLEMENT BELOW WAS FAIR AND JUST, AND NO FURTHER OPPORTUNITY TO BE HEARD IN OPPOSITION TO IT OUGHT TO BE GRANTED TO THE WOULD-BE INTERVENORS

The argument is made that the court below should not have entered its judgment without providing notice and an opportunity to be heard to all who might be affected by it, and that the failure to give this notice deprived the would-be intervenors of an opportunity to demonstrate the injustice of

the court's order. The answer to this argument is first that ample notice was given; second that the order is demonstrably fair; and third, that the would-be intervenors have already received below the full consideration to which they claim to be entitled.

As to notice, the arguments of Part I need not be repeated. It should only be reiterated that all were on notice that the case might well be settled without a trial and that all firefighters had a right to intervene in the event they wanted to participate in the lawsuit in any way. The applicants for intervention received one formal invitation and constant reminders; the court was not required to send them a second formal invitation.

The fairness of the order is plain. It was entered only after the most protracted negotiations and heroic personal efforts by the trial judge to maintain amicable relations between hostile parties in court and in the fire department. The order was drawn to protect the interests of all persons who would be affected by it.

At the start of this lawsuit quotas were sought by the plaintiffs on the promotional level, in order to remedy a long history including both unintentional and intentional discrimination against members of the plaintiffs' class. As a result of this discrimination, only one member of the plaintiffs' class had ever achieved a supervisory rank in New Haven's Department of Fire Services. Discrimination was manifested in the "stacking" or stockpiling of appointments of white candidates just prior

to the administration of a new exam (Br. App. 16B) the administration of culturally biased exams, (Br. App.6B) the favoritism shown toward specific white ethnic groups in efficiency ratings (Br.App3B),

and the long history of other abuses. Unlike the system in BRIDGEPORT GUARDIANS, Supra which was concededly "color blind", the history in New Haven was of color consciousness, and overt racial discrimination. In light of that history the plaintiffs believed that a promotional quota -- stretching through all of the ranks, and extending well into the future -- was in order. Such quotas would have, indeed, affected the interests of the appellants, many of whom have benefited from the history of discrimination.

The City Attorney's office, appearing on behalf of the Board of Fire Commissioners, the Civil Service Commission, the Fire Chief, and others, was in the best position to know whether the plaintiffs' claims were justified or not. They manifested their concern by avoiding a public airing of the plaintiffs' claims (a situation which all agreed would be disasterous to the operation of a fire department already suffering from the strains of racial divisiveness) and by pursuing alternatives to a trial on the merits. Nevertheless the defendants refused to acceed to the plaintiffs' demands for promotional quotas on the basis that such quotas, continuing year after year and extending through the promotional ranks, would have a tendency to undermine the operation of the Civil Service System, to the detriment of whites who had embarked on a career in the Department of Fire Services.

The court, in an effort to mediate, suggested a settlement which acceeded to the demands of the City to avoid a quota,

protected the interests of the whites in the department who had appeared in the case (as well as those who had not), and granted relief to specific minority members of the department, who were the actual victims of racial discrimination in the past. This "one shot" relief applied to the lieutenants level only and maintained the civil service system intact for the future, with the assurance that promotions would be made in a "color blind" manner from now on. The settlement was designed to insure that no whites who would have been promoted lost their opportunity for promotion because of the decree. The relief went only to named individuals many of whom would have been promoted years ago had it not been for the City's policy of discrimination. It was not "fashioned" by the Court, but was the specific relief contemplated by 42 U.S.C. 2000e-5(g) for individuals subjected to discrimination in promotions.

Contrary to the assertions of the appellants, no relief was granted on the Captain's level and no Sword of Damocles hangs over the Department except for the previously ignored obligation to comply with the provisions of federal law.

The would be intervenors were given the opportunity below to make whatever claims they wished with respect to the fairness of the court's order. Their claims amounted to much talk of secrecy and deception, which have been discussed above, but very little indeed to show that the court's order was in any way unfair or unjust. The bare assertion was made that the lieutenants' examination was job-related and a valid predictor of job performance, but that conclusion is a weak reed on which

to reopen a judgment entered after the full consideration this judgment was given. The City does not claim the test is valid, and no validation studies or evidence of validity was offered by the Applicants for Intervention below, because there is none. Plaintiffs had established a strong case for settlement on the promotional level which remains unrefuted by the offers of proof of the Applicants for Intervention.

In this court, they suggest that the judgment should be reopened so that RIOS V. ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL #638, 501 F.2d 622 (2 Cir. 1974) may be overruled. That is not a valid reason to reopen the judgment. Nor is reliance on BRIDGEPORT GUARDIANS, Supra., which distinguishes not between promotions and hiring but between instances where there is a strong showing of discrimination and those in which there is not.

The court below in its elaborate, detailed, careful and comprehensive narration of the steps that led to the settlement and the justification for it admirably performed the only remaining function of a public hearing on a proposed settlement: dissemination to those affected of the reason for the settlement. It would at this point be superfluous to remand this case for a second determination that this order is a fair one -- fair to the Applicants for Intervention as well as to the plaintiffs, other firefighters, the Department and to the City of New Haven and its people.

CONCLUSION

For all these reasons, the judgment below should be affirmed.

PLAINTIFFS-APPELLEES

BY _____
MICHAEL R. KOSKOFF
KOSKOFF, KOSKOFF, RUTKIN & BIEDER
1241 Main Street
Bridgeport, Connecticut 06604
Counsel for Plaintiffs-Appellees

BY _____
DAVID N. ROSEN
ROSEN AND DOLAN
265 Church Street
New Haven, Connecticut
Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent, postage prepaid, on this 4th day of April, 1975, to the following counsel of record:

Attorney Roger J. Frechette
215 Church Street
New Haven, Connecticut

Attorney W. Paul Flynn
132 Temple Street
New Haven, Connecticut

Attorney Frank S. Meadow
161 Church Street
New Haven, Connecticut

Attorney J. Daniel Sagarin
855 Main Street
Bridgeport, Connecticut

MICHAEL P. KOSKOFF

BRIEF APPENDIX

Exhibit A

CHARGE OF DISCRIMINATION

The undersigned affiants charge the City of New Haven, Connecticut, Fire Department, the City of New Haven Civil Service Commission, municipal agencies, and the City of New Haven with discrimination against them on account of race and color.

This discrimination is against all non-white persons. It is a course of conduct which has continued until the present. A copy of this complaint is being filed with the State of Connecticut Commission on Human Rights and Opportunities.

NATURE OF DISCRIMINATION

The hiring practices of the New Haven Fire Department have discriminated and continue to discriminate against non-whites. Although the population of the City of New Haven is approximately 25% black and Puerto Rican there is only 3% minority representation in the City's fire department. The City hired its first black fireman in 1953, and as recently as 1957 there were only two black firemen, although the department at these times had several hundred members and now has over 500.

OSEN & DOLAN
TTORNEYS AT LAW
5 CHURCH STREET
EW HAVEN, CONN.
06510
(203) 787-3513

The promotion practices of the New Haven Fire Department also discriminate against non-whites. The system of promotion perpetuates past discrimination. Consequently only one non-white -- with twenty-one years' service is an officer in the department.

The following discriminatory devices are presently employed by the New Haven Department:

1. Entrance and promotion examinations are culturally biased against non-whites resulting in a substantially disproportionate failure rate among non-white applicants, are not validated, and do not measure aptitude or ability as a firefighter.

2. Physical performance tests are also used as part of the entrance examination but the proportions assigned to different parts of the examination are not publicly announced or disclosed to the applicants and may vary.

3. Certain mandatory requirements such as age and height are and have been waived for white applicants but not for non-white ones.

4. Non-white applicants, including the complainant, Rodney Taylor, have been rejected for false and spurious reasons, but white applicants are not so rejected. The complainant Taylor was told he was too short for the job,

although he is taller than the minimum height required.

5. The accession system is not insulated against discrimination. The Board of Fire Commissioners is not bound to take applicants in the order of their scores on the entrance tests but can pick and choose applicants who have scored high or low.

6. Past discrimination in hiring is perpetuated as discrimination in promotions by a requirement of serving five years in grade before being eligible for promotion.

7. Vacancies among higher ranks are often filled on the basis of promotional examinations for which eligibility lists were closed years before, thus effectively precluding advancement by non-whites because of past discrimination in hiring.

8. The number of people to be promoted or the passing score on promotional examinations are not publicly announced or determined in advance; the number of people promoted after an examination can be and has been manipulated in favor of whites, but not blacks.

9. No active recruiting program has been initiated by the Fire Department to remedy past discrimination.

NEW HAVEN FIREBIRDS

BY George Sweeney
GEORGE SWEENEY, PRESIDENT

The undersigned complainants are all members of the New Haven Firebirds.

George Sweeney

Donald Wilson

Earl Geyer

Charles Goodson

Tim Watkins

Clarence Smith

Charles Holness

Martin Goodson

Donald Holness

Jimmy La Boone

Robert Miller

Thomas Bullock

Clyde Stewart

Floyd Williams

The undersigned is an unseccessful black applicant to the New Haven Fire Department.

Rodney M. Taylor

OSEN & DOLAN
TORNEYS AT LAW
5 CHURCH STREET
W HAVEN, CONN.
06510
203) 787-3513

Subscribed and sworn to before me this 15th day of May, 1973.

David N. Rosen
Commissioner of Superior Court

ROSEN & DOLAN
ATTORNEYS AT LAW
155 CHURCH STREET
NEW HAVEN, CONN.
06510
(203) 787-3513

EXHIBIT B

AFFIDAVIT OF RICHARD BARRETT

I, Richard S. Barrett, being first duly sworn, depose and say:

1. I make this affidavit in support of plaintiffs' Motion for Temporary Restraining Order in the case of New Haven Firebirds v. Board of Fire Commissioners. I am presently Professor of Management Science at Stevens Institute of Technology in New Jersey, and Director of its Laboratory of Psychological Studies. In the latter capacity I am a consultant in connection with industrial psychological problems, particularly matters dealing with fair employment issues. The laboratory is consulting with the Pennsylvania State Police Department to make their selection and promotion procedures valid and fair for minority candidates. In the past I have consulted on employment testing with, among others, the National League for Nursing, the United States Air Force, Standard Oil (New Jersey), Lever Brothers, and Equitable Life Insurance Society. I received a B.S. in Administrative Engineering from Cornell University in 1948, an M.A. in Education from Syracuse in 1952, and a Ph.D. in Industrial Psychology from Western Reserve University in 1956.

2. I was principal investigator on s study, sponsored by the Ford Foundation which resulted in publication of the

book, Testing and Fair Employment, by Kirkpatrick, Jr., Ewen, R., Barrett, R., and Katzell, R. I have testified as an expert witness in major fair employment hiring cases including Griggs v. Duke Power Co., and Chance v. Board of Examiners, and eight cases regarding the selection or promotion, or both, of police officers, including the recent cases of Pennsylvania v. O'Neill and Bridgeport Guardians, Inc., v. Bridgeport Civil Service Commission, and one case involving firefighters, Harper v. Mayor and City Council of Baltimore.

3. I have examined the Otis Employment Test 2A which, I understand, is used to screen out all applicants who score less than 70% and is further used for some of the applicants to establish a rank order list from which appointments are made. I have not seen a manual, nor any data reflecting performance on the test or its validity.

4. I am of the opinion that the test is inappropriate for use in the selection of firefighters. It is an old test, Copyright 1922. Although it is still in print, it is not mentioned in the Seventh Mental Measurements Yearbook (1972), and it is not reviewed in the Sixth Mental Measurements Yearbook (1965). It is a highly academic test of vocabulary,

logic, geometry, arithmetic and number series. Such a test is most typically used in an academic setting where it may be used to predict course grades. The series of tests of which it is a part has been updated with the Otis-Lennon Test, which is designed strictly for an academic setting.

5. It is my opinion that this test is of a kind which is most discriminatory against blacks and those of Spanish language background because of its emphasis on the academically oriented items. For many reasons, including inferior education, attitudes toward testing, and language differences, blacks and Spanish language background persons have almost universally done poorly in such tests.

6. Based on my limited knowledge of firefighting, I do not believe that the test can be shown to have content validity, that is, that it is a sample of job performance or tests essential knowledge or skills. It tests verbal, numerical and other academic skills; the firegighter works on an intensely physical job.

7. Although criterion-related validity studies are technically feasible for the test in a fire department employing 500 men, it is my opinion that the test is most

unlikely to be amenable to a demonstration of criterion related validity, that is, it will not be possilbe to show that high scorers on the test perform better on the job. To be sure, a firefighter is required to learn many things which are not already to him as an applicant, and the Otis Employment test is, in part a test of learning ability. However, experience has shown that a relationship between tests such as the Otis and ability to perform on a newly learned job is not consistent. In any event, it can be established only by a criterion related validity study.

8. I have been informed that the promotion examination consists of two parts, an essay examination and a rating. Both, as I understand their application are almost certain to be invalid, and likely to discriminate.

9. Essay examinations tap the higher order skill of writing prose, a skill which is most likely to be deficient in the black and Spanish background candidates for the reasons cited regarding the Otis Test. Furthermore, essay tests are extremely difficult to grade accurately. For example, the Educational Testing Service, the largest test construction organization, has never been able to de- 9B

velop a satisfactory scoring procedure for essay examinations. They are also open to bias in scoring if the scorer recognizes terminology or forms of expression which are characteristic of Blacks or Spanish speaking candidates.

The possibility of showing the tests to be either content or criterion-related valid is remote for the reasons cited regarding the Otis Test.

10. It is my understanding that the Fire Chief rates 500 firefighters with the advice and comment of the Mayor. It is manifestly impossible for one person to be sufficiently familiar with the performance of 500 individuals to be able to rate them; it is, in fact, rare for anyone to be able to rate 20. For ratings to be valid and fair, they must be performed by a person who knows the subject's performance intimately, who has been trained in the use of a professionally developed rating procedure, and who is supervised and motivated to give accurate ratings. It is especially important that the rater be able to document his ratings so as to make as sure as is possible, that he has not allowed conscious or unconscious ethnic bias to influence his report.

11. The rating procedure as it is described herein is wide open for the unrestrained exercise of bias and is 10B

almost certainly incapable of justification on the grounds of either content or criterion related validity.

Richard S. Barrett

Richard S. Barrett

Subscribed and sworn before me at Hastings-on-Hudson, New York, this 5th day of October 1973.

Daniel Rosen

Commissioner of Superior Court

SEN & DOLAN

EXHIBIT "C"

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

JSP:DH:lt
DJ 170-017-14

NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

OCT 2 1973

Mr. George Sweeney, President
Firebirds Association
c/o Rosen & Dolan
265 Church Street
New Haven, Connecticut 06510

Re: EEOC Charge Against City of New Haven
Fire Department
No. TBO 3 - 1071

Dear Mr. Sweeney:

Because your organization has filed a charge against the respondent named above with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge, and this Department has determined that it will not file any lawsuit based upon that charge within that time, and because you have specifically requested this Notice, you are hereby notified that any of the charging parties has the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., against the above named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of the suit without payment of fees, costs, or security. In order to apply for an appointed attorney, you may take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States District Court in New Haven, Connecticut.

Your attorney may inspect the investigative file pertaining to your case at a time and place convenient to the parties. That file is located in the EEOC District Office, at 100 Charles River Plaza, 5th Floor, Boston, Massachusetts 02114.

We request that you send this Department a copy of any complaint initiating suit.

This notice should not be taken to mean that an agency of the United States has made a judgment as to whether or not your charge is meritorious.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

BY: Eileen M. Stein

EILEEN M. STEIN
Attorney
Employment Section

cc: Mr. David Rosen, Esquire
Rosen & Dolan
265 Church Street
New Haven, Connecticut 06510

Mr. James Nunes, Director
EEOC District Office
100 Charles River Plaza
5th Floor
Boston, Massachusetts 02114

EXHIBIT D

AFFIDAVIT

I, GEORGE SWEENEY, being sworn, depose and say:

1. I am 41 years old.

2. I was appointed to the New Haven Department of Fire Services on April 8, 1957, and I have been a member of the Department continuously for the past 17 and 1/2 years.

3. I have taken the lieutenant's exam twice, the last time in 1970. I passed the exam both times, but was not appointed a lieutenant.

4. I am the president of the Firebird Society of New Haven, Inc. a non-profit organization composed of black members of the New Haven Fire Department. The aims and goals of the Firebird Society, as set forth in our constitution are as follows:

a. To promote a better understanding, to promote friendship and cooperation among all members of the Fire Department of the City of New Haven.

b. To promote a better understanding between the black community and the Fire Department.

c. We shall encourage the black members of the Department of Fire Service to thoroughly familiarize themselves with the rules and regulations of the Fire Service, as well as the procedure, so that these men may better serve the city and the community in which they work.

d. The organization shall be dedicated to helping fellow firefighters, black in particular, toward promotional aspirations by holding study sessions with the existing firefighters as well as those aspiring to be firefighters.

e. To raise funds for needy persons who have fallen victims to the ravish of fire. Also for Ghetto area self-improvement programs.

f. We shall try to stem the flow of ill feeling between the ghetto area and fire service of the City of New Haven. We shall lend ourselves to alleviate the feeling of a double standard in fire-fighting and overhauling in ghetto communities. To these aims and goals we pledge this organization and ourselves.

5. I make this affidavit both as an individual, and as president of the Firebird Society. I have discussed the facts presented in this affidavit with the members of the Firebird Society, and assert that these facts are true on behalf of the organization, as well as myself individually.

6. On May 18, 1972, the Firebird Society sent letters to Mayor Bart Guida, Chief Francis Sweeney, and Michael DePalma, President of the New Haven Board of Fire Commissioners expressing concern at the low percentage of minorities in the New Haven Department of Fire Services. We received no response to any of these letters.

7. On June 15, 1973, the Firebird Society filed a complaint with the Federal Equal Employment Opportunity Commission and the State of Connecticut Commission on Human Rights and Opportunities. We have had no response from this complaint. We expected that the City of New Haven would act in good faith by not making more appointments during the time our complaint was waiting for action by the EEOC.

8. On August 31, 1973, 17 Captains were appointed by the Department from a list compiled on August 25, 1971. No blacks or hispanics were among those appointed. There was one black on the list eligible for appointment, but he was three positions below the last man appointed. These appointments were made one day before the list was to expire.

9. These appointments were made to create a new battalion in the Department, but only four of these seventeen Captains will be needed in the new battalion.

10. On September 6, 1973, the Department appointed 16 firefighters from a substitute list compiled on August 17, 1972. Only one of those appointed was black. There are no remaining minorities on this August 17, 1972 substitute list. Only 5 blacks were initially on the list of approximately 100.

11. These threatened new assignments will irreparably injure plaintiffs and their class in the following ways:

(a) Based on my experience and my knowledge of the Department of Fire Services, there will not be vacancies for all 17 Captains just appointed until approximately 1983. Thus no blacks will be assigned as Captain until at least that date.

(b) Based on my experience and my knowledge of the Department of Fire Services, there are approximately 5-12 openings in the rank of Private per year. Since the population of the City of New Haven is declining, that number will probably not increase substantially in the foreseeable future. Appointment of 11 white and only 1 black firefighter therefore forecloses any likelihood of significantly increasing the number of blacks in the Department of Fire Services for the next year.

(c) In my experience as a firefighter in the City of New Haven I have come to realize that the minority community of New Haven has been inadequately serviced by the Fire Department. This is due to the lack of minority personnel in supervisory ranks and the failure and/or unwillingness of current supervising personnel to understand and/or answer the needs of

the minority community. I believe that this situation creates an immediate danger to the lives and property of the minority citizens of New Haven.

12. These recent actions of the Department indicate that the Department is trying to "stack" itself with white personnel, making it impossible for black and Hispanic applicants to get into the department, or to advance within the ranks.

13. There is no effective program of recruitment of minorities. In particular, the department did not recruit in the black community before the April, 1972 entrance exam.

14. The Civil Service Commission will soon be holding a new exam for the rank of lieutenant although the date of this exam has not yet been announced. I plan to take this exam.

15. I believe that the current promotion system within the New Haven Department of Fire Services is racially biased against minorities. The promotion lists are compiled from two scores, a written test which counts for 55% and an "efficiency rating" which counts for 45%. This "efficiency rating" is given after the written exam, and is issued by the Chief of the Department. The use of the efficiency rating allows subjective factors to enter into the promotion process, and allows discrimination against black persons. In addition, the completely unregulated system of choosing the number of appointments to be made, whereby the number of men promoted is determined only after test results are released and is frequently - as in the case of the recent Captaincy appointments - of more men than there are vacancies to be filled, can easily be and is manipulated to discriminate against blacks.

16. I believe that the present written examinations and the entire promotion system within the New Haven Department of Fire Services is racially biased against minorities. I feel that many members of the black community are not informed about the Department, and feel that they can't make progress in promotions within the Fire Department, because of the notable lack of success of minority members of the Department, and the Services' knowledge that the Department favors those of other ethnic backgrounds.

17. On information and belief, blacks in the Department have taken promotional examinations a total of six times. We have passed all six times. However, only once was the list not stopped above us, most commonly, just above us. In the recent selection of Captains the list was stopped two names above the only eligible black.

18. The new Captains who will soon be assigned will make it possible for the Department to open a new battalion. This new battalion, however, will not put any additional men in the field fighting fires. It is as of now purely an organizational rearrangement creating more supervisory personnel and no more men or equipment to fight fires. The Department's efficiency will not be reduced if creation of this new battalion is delayed.

19. Some of the new Captains may be assigned any day. The new fire fighters will complete their training and be assigned to firehouses on abour November 5, 1973. Immediate action by the Court is necessary to maintain the status quo with respect to these positions.

18B

GEORGE SWEENEY

OTIS EMPLOYMENT TESTS 2A

TEST 2—FORM A

Read this page. Do what it tells you to do.

Do not open this paper, or turn it over, until you are told to do so. Fill these blanks, giving your name, age, etc. Write plainly.

Name..... Age last birthday.....years
First name, initial, and last name

Address..... Date.....19.....

This is a test to see how well you can think. It contains questions of different kinds. Here is a sample question already answered correctly. Notice how the question is answered:

Which one of the five words below tells what an apple is?
1 flower, 2 tree, 3 vegetable, 4 fruit, 5 animal.....(*4*)

The right answer, of course, is "fruit"; so the word "fruit" is underlined. And the word "fruit" is No. 4; so a figure 4 is placed in the parentheses at the end of the dotted line. This is the way you are to answer the questions.

Try this sample question yourself. Do not write the answer; just draw a line under it and then put its number in the parentheses:

Which one of the five words below means the opposite of north?
1 pole, 2 equator, 3 south, 4 east, 5 west.....( )

The answer, of course, is "south"; so you should have drawn a line under the word "south" and put a figure 3 in the parentheses. Try this one:

A foot is to a man and a paw is to a cat the same as a hoof is to a — what?
1 dog, 2 horse, 3 shoe, 4 blacksmith, 5 saddle.....( )

The answer, of course, is "horse"; so you should have drawn a line under the word "horse" and put a figure 2 in the parentheses. Try this one:

At four cents each, how many cents will 6 pencils cost?.....( )

The answer, of course, is 24, and there is nothing to underline; so just put the 24 in the parentheses.

If the answer to any question is a number or a letter, put the number or letter in the parentheses without underlining anything. Make all letters like printed capitals.

The test contains 75 questions. The examiner will tell you how much time you can have for the examination. You are not expected to be able to answer all the questions, but do the best you can. Try to get as many right as possible. Be careful not to go so fast that you make mistakes. Do not spend too much time on any one question. No questions about the test will be answered by the examiner after the test begins.

Do not turn this page until you are told to begin.

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19B

EXAMINATION BEGINS HERE:

1. The opposite of hate is (?)
   1 enemy, 2 fear, 3 love, 4 friend, 5 joy..... ( )
2. If 3 pencils cost 5 cents, how many pencils can be bought for 50 cents?..... ( )
3. A bird does not always have (?)
   1 wings, 2 eyes, 3 feet, 4 a nest, 5 a bill..... ( )
4. The opposite of honor is (?)
   1 glory, 2 disgrace, 3 cowardice, 4 fear, 5 defeat..... ( )
5. A fox most resembles a (?)
   1 wolf, 2 goat, 3 pig, 4 tiger, 5 cat..... ( )
6. Quiet is related to sound in the same way that darkness is related to (?)
   1 a cellar, 2 sunlight, 3 noise, 4 stillness, 5 loud..... ( )
7. A party consisted of a man and his wife, his two sons and their wives, and four children in each son's family. How many were there in the party?..... ( )
8. A tree always has (?)
   1 leaves, 2 fruit, 3 buds, 4 roots, 5 a shadow..... ( )
9. The opposite of economical is (?)
   1 cheap, 2 stingy, 3 extravagant, 4 value, 5 rich..... ( )
10. Silver is more costly than iron because it is (?)
    1 heavier, 2 scarcer, 3 whiter, 4 harder, 5 prettier..... ( )
11. Which one of the six statements below tells the meaning of the following proverb? "The early bird catches the worm."..... ( )

    1. Don't do the impossible.
    2. Weeping is bad for the eyes.
    3. Don't worry over troubles before they come.
    4. Early birds like worms best.
    5. Prompt persons often secure advantages over tardy ones.
    6. It is foolish to fret about things we can't help.

12. Which statement above tells the meaning of this proverb? "Don't cry over spilt milk."..... ( )
13. Which statement above explains this proverb? "Don't cross a bridge till you get to it."..... ( )
14. An electric light is related to a candle as an automobile is to (?)
    1 a carriage, 2 electricity, 3 a tire, 4 speed, 5 glow..... ( )
15. If a boy can run at the rate of 6 feet in $\frac{1}{4}$ of a second, how many feet can he run in 10 seconds? ( )
16. A meal always involves (?)
    1 a table, 2 dishes, 3 hunger, 4 food, 5 water..... ( )
17. Of the five words below, four are alike in a certain way. Which is the one not like these four?
    1 bend, 2 shave, 3 chop, 4 whittle, 5 shear..... ( )
18. The opposite of never is (?)
    1 often, 2 sometimes, 3 occasionally, 4 always, 5 frequently..... ( )
19. A clock is related to time as a thermometer is to (?)
    1 a watch, 2 warm, 3 a bulb, 4 mercury, 5 temperature..... ( )
20. Which word makes the truest sentence? Men are (?) shorter than their wives.
    1 always, 2 usually, 3 much, 4 rarely, 5 never..... ( )
21. One number is wrong in the following series. What should that number be?
    1 4 2 5 3 6 4 7 5 9 6 9..... ( )
22. If the first two statements following are true, the third is (?) All members of this club are Republicans. Smith is not a Republican. Smith is a member of this club.
    1 true, 2 false, 3 not certain..... ( )
23. A contest always has (?)
    1 an umpire, 2 opponents, 3 spectators, 4 applause, 5 victory..... ( )
24. Which number in this series appears a second time nearest the beginning?
    6 4 5 3 7 8 0 9 5 9 8 8 6 5 4 7 3 0 8 9 1..... ( )
25. The moon is related to the earth as the earth is to (?)
    1 Mars, 2 the sun, 3 clouds, 4 stars, 5 the universe..... ( )
26. Which word makes the truest sentence? Fathers are (?) wiser than their sons.
    1 always, 2 usually, 3 much, 4 rarely, 5 never..... ( )

20B

27. The opposite of awkward is (?)
1 strong, 2 pretty, 3 short, 4 graceful, 5 swift ..... ( )

28. A mother is always (?) than her daughter.
1 wiser, 2 taller, 3 stouter, 4 older, 5 more wrinkled ..... ( )

29. Which one of the six statements below tells the meaning of the following proverb? "The burnt child dreads the fire." ..... ( )

1. Frivolity flourishes when authority is absent.
2. Unhappy experiences teach us to be careful.
3. A thing must be tried before we know its value.
4. A meal is judged by the dessert.
5. Small animals never play in the presence of large ones.
6. Children suffer more from heat than grown people.

30. Which statement above explains this proverb? "When the cat is away, the mice will play." ( )

31. Which statement above explains this proverb? "The proof of the pudding is in the eating." ( )

32. If the settlement of a difference is made by mutual concession, it is called a (?)
1 promise, 2 compromise, 3 injunction, 4 coercion, 5 restoration ..... ( )

33. What is related to disease as carefulness is to accident?
1 doctor, 2 surgery, 3 medicine, 4 hospital, 5 sanitation ..... ( )

34. Of the five things below, four are alike in a certain way. Which is the one not like these four?
1 smuggle, 2 steal, 3 bribe, 4 cheat, 5 sell ..... ( )

35. If 10 boxes full of apples weigh 400 pounds, and each box when empty weighs 4 pounds, how many pounds do all the apples weigh? ..... ( )

36. The opposite of hope is (?)
1 faith, 2 misery, 3 sorrow, 4 despair, 5 hate ..... ( )

37. If all the odd-numbered letters in the alphabet were crossed out, what would be the tenth letter not crossed out? Print it. *Do not mark the alphabet.*
A B C D E F G H I J K L M N O P Q R S T U V W X Y Z ..... ( )

38. What letter in the word SUPERFLUOUS is the same number in the word (counting from the beginning) as it is in the alphabet? Print it ..... ( )

39. What people say about a person constitutes his (?)
1 character, 2 gossip, 3 reputation, 4 disposition, 5 personality ..... ( )

40. If $2\frac{1}{2}$ yards of cloth cost 30 cents, how many cents will 10 yards cost? ..... ( )

41. If the words below were arranged to make a good sentence, with what letter would the second word of the sentence begin? Make it like a printed capital.
same means big large the as ..... ( )

42. If the first two statements following are true, the third is (?) George is older than Frank. James is older than George. Frank is younger than James.
1 true, 2 false, 3 not certain ..... ( )

43. Suppose the first and second letters in the word CONSTITUTIONAL were interchanged, also the third and fourth letters, the fifth and sixth, etc. Print the letter that would then be the twelfth letter counting to the right ..... ( )

44. One number is wrong in the following series. What should that number be?
0 1 3 6 10 15 21 28 34 ..... ( )

45. If $4\frac{1}{2}$ yards of cloth cost 90 cents, how many cents will $2\frac{1}{2}$ yards cost? ..... ( )

46. A man's influence in a community should depend upon his (?)
1 wealth, 2 dignity, 3 wisdom, 4 ambition, 5 political power ..... ( )

47. What is related to few as ordinary is to exceptional?
1 none, 2 some, 3 many, 4 less, 5 more ..... ( )

48. The opposite of treacherous is (?)
1 friendly, 2 brave, 3 wise, 4 cowardly, 5 loyal ..... ( )

49. Which one of the five words below is most unlike the other four?
1 good, 2 large, 3 red, 4 walk, 5 thick ..... ( )

50. If the first two statements following are true, the third is (?) Some of Brown's friends are Baptists. Some of Brown's friends are dentists. Some of Brown's friends are Baptist dentists.
1 true, 2 false, 3 not certain ..... ( )

51. How many of the following words can be made from the letters in the word LARGEST, using any letter any number of times?
great, stagger, grasses, trestle, struggle, rattle, garage, strangle ..... ( )

52. The statement that the moon is made of green cheese is (?)
1 absurd, 2 misleading, 3 improbable, 4 unfair, 5 wicked ..... ( )

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53. Of the five things following, four are alike in a certain way. Which is the one not like these four?
1 tar, 2 snow, 3 soot, 4 ebony, 5 coal..... ( )

54. What is related to a cube in the same way in which a circle is related to a square?
1 circumference, 2 sphere, 3 corners, 4 solid, 5 thickness..... ( )

55. If the following words were seen on a wall by looking in a mirror on an opposite wall, which word would appear exactly the same as if seen directly?
1 OHIO, 2 SAW, 3 NOON, 4 MOTOR, 5 OTTO..... ( )

56. If a strip of cloth 24 inches long will shrink to 22 inches when washed, how many inches long will a 36-inch strip be after shrinking?..... ( )

57. Which of the following is a trait of character?
1 personality, 2 esteem, 3 love, 4 generosity, 5 health..... ( )

58. Find the two letters in the word DOING which have just as many letters between them in the word as in the alphabet. Print the one of these letters that comes first in the alphabet.
A B C D E F G H I J K L M N O P Q R S T U V W X Y Z..... ( )

59. Revolution is related to evolution as flying is to (?)
1 birds, 2 whirling, 3 walking, 4 wings, 5 standing..... ( )

60. One number is wrong in the following series. What should that number be?
1 3 9 27 81 108..... ( )

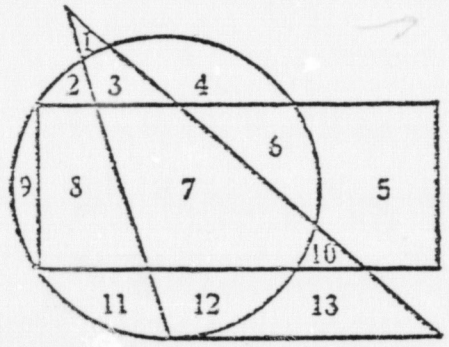
61. If Frank can ride a bicycle 30 feet while George runs 20 feet, how many feet can Frank ride while George runs 30 feet?..... ( )

62. Count each N in this series that is followed by an O next to it if the O is not followed by a T next to it. Tell how many N's you count.
N O N T Q M N O T M O N O O N Q M N N O Q N O T O N A M O N O M..... ( )

63. A man who is averse to change is said to be (?)
1 democratic. 2 radical, 3 conservative, 4 anarchistic, 5 liberal..... ( )

64. Print the letter which is the fourth letter to the left of the letter which is midway between O and S in the alphabet..... ( )

65. What number is in the space which is in the rectangle and in the triangle but not in the circle? ( )



66. What number is in the same geometrical figure or figures as the number 8?..... ( )

67. How many spaces are there that are in any two but only two geometrical figures?..... ( )

68. A surface is related to a line as a line is to (?)
1 solid, 2 plane, 3 curve, 4 point. 5 string..... ( )

69. If the first two statements following are true, the third is (?) One cannot become a good violinist without much practice. Charles practices much on the violin. Charles will become a good violinist.
1 true, 2 false, 3 not certain..... ( )

70. If the words below were arranged to make the best sentence, with what letter would the last word of the sentence end? Print the letter as a capital.
sincerity traits courtesy character of desirable and are..... ( )

71. A man who is influenced in making a decision by preconceived opinions is said to be (?)
1 influential, 2 prejudiced, 3 hypocritical, 4 decisive, 5 impartial..... ( )

72. A hotel serves a mixture of 2 parts cream and 3 parts milk. How many pints of cream will it take to make 15 pints of the mixture?..... ( )

73. What is related to blood as physics is to motion?
1 temperature, 2 veins, 3 body, 4 physiology, 5 geography..... ( )

74. A statement the meaning of which is not definite is said to be (?)
1 erroneous, 2 doubtful, 3 ambiguous, 4 distorted, 5 hypothetical..... ( )

75. If a wire 20 inches long is to be cut so that one piece is $\frac{3}{4}$ as long as the other piece, how many inches long must the shorter piece be?..... ( )

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